

*River
substantial development
permit*

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BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL
DEVELOPMENT PERMIT ISSUED BY
SKAGIT COUNTY TO VALLEYS WEST

SKAGIT RIVER LEAGUE, STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY and SLADE GORTON,
ATTORNEY GENERAL,

Appellants,

v.

SKAGIT COUNTY and VALLEYS
WEST,

Respondents.

SHB Nos. 228, 228-A and 228-B
FINAL
FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the consolidated appeals from the issuance of a shoreline substantial development permit to Valleys West by Skagit County came before the Shorelines Hearings Board (Art Brown, Chairman, W. A. Gissberg, Ralph A. Beswick, and Robert F. Hintz) on November 18, 19, 22, 1976, in Mount Vernon, Washington, and on November 24, 1976, in Lacey, Washington. Member Chris Smith was present on November

1 18 and 19, 1976, and has read the transcript of the testimony for the
2 remainder of the hearing. Hearing examiner David Akana presided.

3 Appellant Department of Ecology was represented by Robert E.
4 Mack, Assistant Attorney General; appellant Attorney General was
5 represented by Laura E. Eckert, Assistant Attorney General; appellant
6 Skagit River League was represented by its attorney, Lewis A. Bell;
7 respondent Valleys West was represented by its attorney, Robert L.
8 Gunter; respondent Skagit County was represented by William Nielson,
9 Deputy Prosecuting Attorney. Olympia court reporter Eugene E. Barker
10 provided reporting services.

11 Having heard or read the testimony, having examined the exhibits,
12 and being fully advised, the Shorelines Hearings Board makes these

13 FINDINGS OF FACT

14 I.

15 A substantial development permit for the development of a planned
16 unit residential development was granted by Skagit County to Valleys
17 West, a partnership, on May 25, 1976. The proposed development is to
18 be constructed on approximately 220 acres on the southerly bank of
19 the Skagit River, a shoreline of state-wide significance, about three
20 miles westerly of and down river from the town of Concrete.

21 II.

22 The proposed development includes 265 residential units, 120
23 campsites and certain areas designated for commercial use and condo-
24 miniums along 9,000 feet of the Skagit River. Water will be provided
25 to each lot. Three thousand feet of bank and 50 acres will remain as open
26 space. The proposal is one designed to accommodate a residential-

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1 recreational development with a minimum visual impact from the river.
2 Portions of the residential, campsite and condominium areas (Division 13,
3 14, 6, 15, 16, 17 and 18) lie within 200 feet of the shoreline of the
4 Skagit River. A large parcel of state land, which is managed by the
5 Department of Natural Resources (DNR), bisects the development.

6 An old abandoned county road across the state property connects
7 the development. One hundred-four lots have been previously given
8 preliminary or final plat approval by the county. The matter here
9 contested involves the remainder of the project.

10 III.

11 A draft Environmental Impact Statement (EIS) was prepared and
12 circulated on November 3, 1975. After comments were received, a final
13 EIS was filed on December 8, 1975. The County Planning Commission
14 found the EIS to be adequate in all respects.

15 IV.

16 At the time of permit issuance, the Skagit County Master Program
17 had not been approved by the planning department, planning commission
18 or county commissioners. However, the master program is ascertainable.
19 A final master program was adopted by the county on June 29, 1976, and
20 approved by the Department of Ecology on October 5, 1976.

21 V.

22 Under the shoreline master program existing at the time of
23 permit issuance (hereinafter "master program"), the designation of
24 the site was "Rural-Residential." The underlying zoning is residential.

25 VI.

26 Section 3.02 of the master program provides that the word

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1 "shall" means mandatory and "should" means that which is recommended
2 but not absolutely required.

3 Section 7.13.2.B.¹ provides:

4 . . .

5 (4) Hazardous and unstable areas

- 6 a. Floodway-Residential structures and accessory
7 facilities of a permanent nature as part of
8 development subject to this program shall be located
9 out of the officially mapped floodway of the Skagit
10 River, its tributaries, and the Samish River.
11 b. Residential structures and accessory facilities
12 are prohibited on accreting, eroding, slumping,
13 or geologically unstable shorelines and where
14 extensive shore defense and/or flood or storm
15 protection structures would be necessary.
16 Proposals for such development shall meet
17 shoreline setbacks, other than those of Table RD,
18 that are deemed suitable to site conditions by the
19 Planning Department.

- 20 (5) Shore defense and flood protection works - Residential
21 development shall be located and designed to avoid the
22 need for structural shore defense and flood protection
23 works.

24 Section 6.04.2 provides in part:

25 Rural Residential Shoreline Area

- 26 a. Definition: The Rural Residential Shoreline Area is
27 a shoreline area characterized by low to medium intensity
land uses that exhibit small scale alterations to the
natural shoreline environment. These land uses are
generally of a residential, commercial, recreational,
and agricultural nature with utilities and services
provided on an individual or community basis.

28 VII.

29 Based upon the best available data, the planned residential

- 30 1. The approved master program uses the term "primary" rather
31 than "accessory" in Section 7.13.2.B.(4)(a).

1 development in Division 6 and the adjacent open space are located
2 within the 100-year floodway as that term is defined by the Department
3 of Ecology and U. S. Army Corps of Engineers and as mapped on plate 39
4 of exhibit A-7. The proposed residential development in Division 6 would
5 be used for human habitation of a permanent nature.

6 VIII.

7 The residential area in Division 8 is within the 100-year
8 "floodway fringe" area, i.e., that wetted area of the flood plain
9 which is not required to carry floodwater. With appropriate flood-
10 proofing, Division 8 can be taken out of the 100-year floodway fringe
11 area without affecting the flow of floodwaters.

12 IX.

13 There is no existing official Skagit County map of the floodway.
14 Skagit County's policy, pending the U. S. Corps of Engineers
15 mapping of the floodway, is to consider the boundaries of the 100-year
16 floodway to be the 15-year flood plain, although not identical. When
17 the Corps determines the 100-year floodway, the county will recognize
18 it as the official floodway for the county.

19 Shoreline stabilization, e.g., riprap, would be required to
20 protect against the 100-year flood if residences are constructed in
21 Division 6. In all other areas where construction is contemplated, there
22 is no need for shore defense or dyking work.

23 X.

24 The Skagit River in the vicinity of the proposed site is a
25 candidate for inclusion under the Wild and Scenic Rivers Act (Public
26 Law 90-542) as a Recreational River Component. The Act suspends

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1 or stays certain federal actions pending a completion of a study and
2 action by Congress or until February 1, 1978. There is no similar
3 stay of state or local actions.

4 The river boundary used in the study is generally the same as the
5 upper extremity line of the 100-year flood plain zone. The boundary
6 approximately bisects Valleys West's property. The study recommends
7 a recreational use for the subject property.

8 The Forest Service study has recommended that about 12 million
9 dollars of federal funds be used for the purchase of property and the
10 acquisition of access or scenic easements. The latter easements would
11 include development rights such as timber cutting. The basic concern of
12 the Forest Service is to protect the view of the shore from the river.
13 Thus, if a development did not interfere with trees and view, the Fores✓
14 Service would have no objection.

15 Development of the site is compatible and consistent with the
16 Recreation designation given to the property. The Forest Service
17 so notified Skagit County prior to the issuance of the subject permit
18 but with one reservation, that being the unknown height of the
19 condominiums in Division 18. Provisions of the master program
20 applicable to the site are consistent with the Wild and Scenic
21 Rivers Act.

22 XI.

23 Eagles, which are not an endangered species in this area, occasionall
24 visit the river near the site and the surrounding vicinity to feed on
25 salmon carcasses during the winter months. They migrate elsewhere for the
26 summer. However, they are found primarily in an area upriver from the ✓

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1 site and the town of Concrete for it is there that the bulk of the salmon
2 spawn and die. Although eagles gather in greater concentrations on the
3 Skagit River than at any other western U. S. river, their numbers have
4 declined during the past 35 years because of a decline in the numbers of
5 salmon spawning areas. Approximately 2,000 acres of land in the vicinity
6 has been or will be acquired by the state for an eagle sanctuary.

7 Osprey are fresh fish eaters and are present in the area from
8 April to September each year. Two osprey nests have been found near
9 the site. Although their numbers are declining, the osprey is not
10 an endangered species.

11 Human activity generated by the development can contribute to
12 the diminishment of eagle and osprey population in the area.

3 XII.

14 There are nearby state and county lands which could, when developed
15 for such a purpose, provide adequate public access from public roads
16 to the Skagit River. In addition, fishing strip easements are now owned
17 by the Department of Game above the high-water mark on the Skagit River.
18 The nearest vehicular public access to the river is six miles upriver
19 from the site. The state owns a large parcel which bisects the site which
20 presently available for casual pedestrian public access. There are no
21 present plans by any public agency to develop pedestrian trails over publi
22 property to the river near the site.

23 The demand for public access to the Skagit River for fishing
24 and recreation is constantly increasing. An easement over the site could
25 provide excellent opportunities for public access to the river and the
26 area below the line of high water. Present private access is now limited

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1 as compared with the access which could be provided if the development
2 can proceed as planned.

3 Although access to the river by members of the public is now
4 granted on a case by case basis by the community association, the
5 roads are private and the present lot owners do not desire the general
6 public to have access over their roads or to use their trails. Their
7 concern is based upon the possibility of vandalism, trespass and theft if
8 project facilities are used by the general public. Present owners purchas
9 their property knowing that the existing roads are private.

10 XIII.

11 Assuming the ultimate development of the proposed project, the
12 site will serve approximately 600 to 800 persons. Spread over the
13 220 acres, the intensity of use is low.

14 XIV.

15 The property report required by the Interstate Land Sales
16 Registration Act discloses to the prospective purchaser whether a
17 particular lot is in the flood plain.

18 XV.

19 Development at the site is phased by division over several
20 years ending in 1995, depending to some degree on the availability of
21 financing. Division 6 is currently scheduled for development in 1983.

22 XVI.

23 Any Conclusion of Law which should be deemed a Finding of Fact
24 is hereby adopted as such.

25 From these Findings, the Board issues these

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1 CONCLUSIONS OF LAW

2 I.

3 The Board has jurisdiction over the persons and the subject matter
4 of this proceeding.

5 II.

6 The instant permit must be measured for consistency with the policy
7 of RCW 90.58.020, the Department of Ecology guidelines, and the master
8 program being developed for the area, insofar as it can be ascertained
9 at the time of permit issuance.

10 III.

11 RCW 90.58.030(2)(g) provides that:

12 "Floodway" means those portions of the area of a
13 river valley lying streamward from the outer limits of
14 a watercourse upon which flood waters are carried during
15 periods of flooding that occur with reasonable regularity,
16 although not necessarily annually, said floodway being
17 identified, under normal condition, by changes in surface
18 soil conditions or changes in types or quality of vegetative
ground cover condition. The floodway shall not include
those lands that can reasonably be expected to be protected
from flood waters by flood control devices maintained by or
maintained under license from the federal government, the
state, or a political subdivision of the state.

19 The term "floodway" as used above is a limitation to the definition of the
20 shorelines and wetlands in the Shoreline Management Act (SMA). It is not
21 the same definition of "floodway" used in chapter 86.16 RCW or chapter
22 508-60 WAC.

23 IV.

24 The proposed residential development in Division 6 is inconsistent
25 with the portion of RCW 90.58.020 which provides that the "policy
26 contemplates protecting against adverse effects to the public health."
27 The "public health" concerns in the SMA are broad enough to encompass

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those "public health" concerns of chapter 86.16 RCW (Flood Control Zones by State) and regulations, chapter 508-60 WAC, promulgated thereunder. RCW 86.16.010 states the policy of the Act:

The alleviation of recurring flood damages to public and private property, to the public health and safety, and to the development of the natural resources of the state is declared to be a matter of public concern

WAC 508-60-040 provides that construction in the floodway must meet several requirements, the fourth of which is that:

The structures or works are not designed for, or will not be used for either (a) human habitation of a permanent nature or (b) uses associated with high flood damage potential.

The reasoning set forth in Stempel v. Dept. of Water Resources, 82 Wn.2d 109 (1973) requires us to conclude that the foregoing statement of policy and regulation prohibiting permanent residential structures in a floodway must be considered when testing a substantial development permit for consistency with RCW 90.58.020. Its reasoning applies to the instant matter. Because permanent residential structures in 100-year floodway are prohibited by the regulation, it would be inconsistent with RCW 90.58.020 to approve a substantial development permit which purports to allow such a prohibited development.

V.

The proposed development (residential, campsite, condominium and commercial uses) as presently conditioned and conceived, is inconsistent with RCW 90.58.020 in that a natural shoreline of state-wide significance would be altered for a private use without any corresponding benefit to the public interest. Provision for public pedestrian access to the

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1 Skagit River at some part of the development would provide a corresponding
2 public benefit. If so conditioned, the development would become
3 consistent with the SMA with respect to the foregoing concerns.

4 VI.

5 WAC 173-16-060(8)² encourages planned unit developments. The
6 residential portion of the proposed development (excepting Division 6)
7 is consistent with WAC 173-16-060(8) except for subsection (c) thereof
8 which encourages inclusion of public pedestrian access to the shorelines.

9 VII.

10 Division 6 of the proposed development is inconsistent with
11 section 7.13.2.B(4) of the draft master program which requires that
12 residential structures shall be located out of the floodway.

13 VIII.

14 Although the EIS could properly be criticized in the area of
15

16 2. WAC 173-16-060(8) provides in part:

17 The following guidelines should be recognized in
18 the development of any subdivision on the shorelines
19 of the state. To the extent possible, planned unit
20 developments (sometimes called cluster developments)
21 should be encouraged within the shoreline area.
Within planned unit developments, substantial portions
of land are reserved as open space or recreational areas
for the joint use of the occupants of the development
Guidelines:

- 22 (a) Subdivisions should be designed at a
level of density of site coverage and
23 of occupancy compatible with the physical
capabilities of the shoreline and water.
- 24 (b) Subdivisions should be designed so as to
adequately protect the water and shoreline
aesthetic characteristics.
- 25 (c) Subdividers should be encouraged to provide
26 public pedestrian access to the shorelines
within the subdivision

1 floodways, such error is harmless in view of our disposition of this
2 permit, i.e., removal of authorized construction of residential
3 structures within the floodway. To require further discussion at this
4 point would be a useless effort achieving no purpose whatsoever, since
5 we have removed the source of the inadequacy from the permit itself.

6 IX.

7 Except as provided above, the proposed development is consistent with
8 the policy of RCW 90.58.020, the guidelines, and the ascertained master
9 program being developed for the area.

10 X.

11 Any Finding of Fact which should be deemed a Conclusion of Law
12 is hereby adopted as such.

13 From these Conclusions, the Shorelines Hearings Board enters
14 this

15 ORDER

16 The substantial development permit issued to Valleys West is
17 remanded to Skagit County to strike Division 6 from the permit and to
18 add to the permit provision for public pedestrian access. The remaining
19 portions of the permit are affirmed.

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1 DATED this 21st day of January, 1977.

2 SHORELINES HEARINGS BOARD

3 Art Brown

4 ART BROWN, Chairman

5 W. A. Gissberg

6 W. A. GISSBERG, Member

7 Chris Smith

8 CHRIS SMITH, Member

9 (See attached opinion)

10 RALPH A. BESWICK, Member

11 Robert F. Hintz

12 ROBERT F. HINTZ, Member

13 (Did not participate)

14 ROBERT E. BEATY, Member

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1 BESWICK, R. A.--Concurring and dissenting:

2 I find the proposed development not inconsistent with the
3 policy of RCW 90.58.020 relating to public pedestrian access
4 contrary to Conclusions of Law V and VI in the majority opinion.
5 There was no showing of need to require public access in view of
6 the presence of public property which bisects the proposed
7 development. Moreover, if any such need for public access arises
8 in the future, the county can acquire the public property for
9 public park use. See RCW 76.12.072. I dissent from the conclusions
10 and order requiring public access but concur with the remainder of
11 the decision.

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13 
14 RALPH A. BESWICK, Member

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